

The issues raised on this appeal from the preliminary hearing order are whether claimant met his burden of proof that he suffered accidental injury arising out of and in the course of his employment with respondent. And whether claimant provided respondent timely notice of the accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

James Swanson is the owner of Stonewood Builders, a construction company. Stonewood was performing carpentry work at Fort Riley in Junction City, Kansas. Mr. Swanson testified that Picerne Military Housing was the general contractor for this project and that his company was a subcontractor. The general contractor provided on-site safety training for all the workers performing work at the military base. Mr. Swanson testified that claimant attended the two and one half hour training session before he began work. All on the job injuries were to be reported to the subcontractors' lead men who would then notify the general contractor.

Claimant had only worked for Stonewood for approximately 13 or 14 days before his alleged accident. Mr. Swanson testified that claimant's job as a laborer included bringing the wood and cleaning up the job site. Claimant testified that on February 9, 2011, he was helping put up a framed wall for a two-story house. The framed wall had to be lifted over a stair case and as claimant was helping lift the frame he felt like he had strained his groin. Claimant further testified that Mr. Swanson asked him if he was all right and claimant said he was okay. Claimant thought they put up one more wall, cleaned the place up and then went home.

Claimant testified that the next day he reported to work but no one was there so he went home. Claimant then decided he needed to go get checked out at the hospital so he called Mr. Swanson and told him that he was going to the hospital because he had injured himself lifting the wall. On February 10, 2011, claimant went to the Geary Community Hospital emergency room. He complained of low back pain. One of the records from the hospital indicates an onset of pain for three days but another form indicated claimant had an injury two days before admission while lifting at work.¹ Claimant was kept off work until February 14, 2011. Claimant testified that he returned to work on February 16th and that was his last day worked, as his employment was then terminated.

Mr. Swanson testified that the first time he became aware that claimant alleged he had injured himself on the job was March 12, 2011, when he received the certified letter from claimant's counsel alleging a low back injury on February 9, 2011. Mr. Swanson further testified that all the walls had been erected over a week before claimant's alleged accident date.

¹ P.H. Trans., Cl. Ex. 1.

Mr. Swanson kept a 2011 binder notebook calendar which he used to write all of his employees' names and the hours they worked each day.² Mr. Swanson had noted on his calendar the claimant had worked 9 hours on Monday, February 7, 2011, and no hours on February 8th and 9th. Mr. Swanson's lead man contacted claimant on February 8, 2011 and was told that claimant had been in an automobile accident and would not be in to work as he was going to the hospital. Mr. Swanson's calendar contains a notation "car accident went to hospital"³ next to claimant's name on February 8, 2011, which shows no hours worked by claimant on that day. Mr. Swanson called claimant the next day and claimant confirmed that he was in a car accident which occurred as he was hit backing out of his driveway with his father. Mr. Swanson further testified:

Q. Did he ever at any point either before or after the conversation that you had regarding the car accident, did he ever report to you that, in fact, he had injured his back while working?

A. No, he never reported to me which I am there most of the time and also I checked with the employees and nobody else had heard either and, like I said, he had been in the safety meeting a few weeks prior to, so he knew if you were injured, you know, you need to tell somebody right away so it can be handled right then.⁴

Claimant denied he was in a car accident.

Mr. Swanson's calendar further indicated claimant did not return to work until February 15, 2011. When claimant returned to work he provided respondent the "Excuse from Work or School"⁵ from Geary Community Hospital which indicated that he could return to full physical activity. There was nothing on the release that referred to a work-related injury and when claimant returned to work he did not say he had been off work because of a work-related injury. On February 15, 2011, claimant worked 6 1/2 hours. On February 16, 2011, claimant worked 3 1/2 hours and was terminated. Mr. Swanson said claimant was terminated by his lead man because it was time to start cutting back on workers as the contract was almost completed and the lead man was not pleased with claimant's job performance and how hard he worked.

The ALJ analyzed the evidence and concluded claimant had failed to meet his burden of proof that he suffered an accidental injury arising out of and in the course of his

² *Id.*, Cl. Ex. 3.

³ *Id.*

⁴ P.H. Trans. at 11.

⁵ *Id.*, Cl. Ex. 1.

employment with respondent. The ALJ also specifically determined claimant was not credible.

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and Mr. Swanson testify in person. In denying claimant suffered accidental injury arising out of and in the course of his employment, the ALJ found Mr. Swanson's testimony more persuasive than claimant's testimony. In fact, the ALJ specifically found the claimant was not credible. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because she was able to judge the witnesses' credibility by personally observing them testify.

The claimant's application for hearing alleged an accident date of February 8 or 9, 2011. Claimant testified that the accident occurred on February 9, 2011, the day before he went to the hospital. But Mr. Swanson's calendar reflected claimant did not work on February 9, 2011. Claimant reported to Mr. Swanson that he could not work on February 8th or 9th because he had been injured in an automobile accident. And a note in Mr. Swanson's calendar indicates claimant was in a car accident. Mr. Swanson testified that lifting a wall frame was not the type of work claimant typically performed and that all the walls were in place over a week before the alleged accident dates. And claimant never reported a work injury at the time the accident allegedly occurred. Moreover, claimant admitted that his history includes convictions for felony possession of a hand gun, possession of opiates, grand theft, breaking and entering and aggravated battery. Based upon the evidentiary record compiled to date this Board Member finds claimant has failed to meet his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated May 2, 2011, is affirmed.

IT IS SO ORDERED.

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2010 Supp. 44-555c(k).

Dated this 28th day of June, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge